United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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DISTRICT OF COLUMBIA
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No. 5640

In the Court of Appeals of the District of Columbia

1774

FRANK DEMETER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

STATEMENT OF FACTS

Frank Demeter, hereinafter referred to as appellant, enlisted in the United States Army on June 21, 1913. During his military service he applied for and was granted a contract of War Risk Insurance in the amount of $10,000, which provided for the payment of monthly installments of $57.50 each in the event of his death or total and permanent disability occurring while the contract was in force. Premiums were paid on the contract to and including the month of April, 1918, and the contract continued in force and effect until May 31, 1918, by virtue of the thirty-one day grace period

allowed by law for the payment of premiums. Appellant was injured on March 29, 1917, by being struck across the back by a timber, and was discharged from the military service on April 23, 1918, on a surgeon's certificate of disability due to his inability to do heavy lifting. The appellant in his declaration alleged that he was totally and permanently disabled on April 23, 1918, and that such disability had continued from said date, and that by reason thereof he became entitled to receive monthly installments of $57.50 under his contract of War Risk Term Insurance from April 23, 1918, to date. The United States of America, hereinafter referred to as appellee, by its plea denied that the appellant became totally and permanently disabled.

The appellant, testifying in his own behalf, stated that he had been unable to work since his discharge from the army except for short periods, and that he had lived in Texas prior to becoming a member of the Soldiers' Home in Washington, D. C., in 1927.

The testimony showed that a large amount of the time that the appellant had spent in hospitals had been for the purpose of observation; that he was employed at various times prior to 1927 for periods of time ranging from a few days to ten months as a salesman, laborer, watchman, orderly, attendant, and machinist; that he was engaged in Federal Vocational Training for a year in 1920 and 1921, during which time, as well as at other times, he

owned and drove an automobile, and that for the past sixteen months he had been acting as a chauffeur for an elderly army officer.

Medical evidence consisting of official Government records and the testimony of physicians concerning the appellant's condition at various times was introduced by both the appellant and appellee.

At the close of all the evidence the case was submitted to a jury, which returned a verdict in favor of the appellee.

ARGUMENT

I

Appellant's assignments numbered 1, 6, 9, and 10

The sole issue in this case was whether the appellant was totally and permanently disabled on or before May 31, 1918.

Before discussing the appellant's assignments of error numbered 1, 6, 9, and 10, the attention of the Court is respectfully directed to the fact that the term "total and permanent disability" contemplated by the provisions of all contracts of War Risk Term Insurance which were granted by the appellee to persons in its military service during the World War has been defined by the Director of the United States Veterans' Bureau pursuant to legislative authority contained in Section 13 of the War Risk Insurance Act, 40 Stat. 55, subsequently reenacted as Section 5 of the World War Veterans' Act, 1924, 43 Stat. 609, as amended July

3, 1930, 46 Stat. 991, 38 U. S. C. 426, the pertinent portion of which provides:

> The Director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this act, and for that purpose shall have full power and authority to make rules and regulations not inconsistent with the provisions of this act, which are necessary or appropriate to carry out its purposes, * * *

The regulation so adopted and so promulgated is known as Treasury Decision No. 20, and has the force of law. *Wojciechowski* v. *U. S.*, 51 Fed. (2d) 385. The regulation forms a part of the contract of insurance. *White* v. *U. S.*, 270 U. S. 175, 46 S. Ct. 274, 70 L. Ed. 530; *Ross* v. *U. S.*, 49 Fed. (2d) 541. The Court will take judicial notice of this regulation. *U. S.* v. *Lawson,* 50 Fed. (2d) 646. It provides as follows:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.

In a suit brought upon a contract of War Risk Term Insurance both elements of the definition must be proven. If an insured proves a total disa-

bility while his contract was in force, but fails to prove that it is permanent in character, he can not recover.

The question presented for the determination of the jury in the instant case was not whether the appellant was disabled from performing the duties incident to the occupation which he had followed prior to entering the United States Army, or whether he was disabled from performing the duties of a soldier, but it was whether he was totally and permanently disabled from following continuously *any* substantially gainful occupation.

(A) Appellant's assignment of error numbered 6 is based upon the refusal of the Court to admit in evidence the portion of the summary of the Commissioner of the Supreme Court concerning the record of an award of compensation on account of total disability to the appellant by the Bureau of War Risk Insurance, which was the predecessor of the United States Veterans' Bureau. (R. 13.) It is to be noted that counsel for the appellant did not stipulate that this record which had been summarized should be admitted in evidence, but reserved the right to object to the same. (R. 12, 13.)

The attention of the Court is invited to the case of *United States* v. *Golden,* 34 Fed. (2d) 367, in which the Circuit Court of Appeals of the 10th Circuit said, at pages 369 and 370:

> The government is quite right in this contention. While the laws as to compensation and insurance are administered by

separate divisions of the Veterans' Bureau, and while the beneficent provisions of both laws are confined to war veterans, there the similarity ends. Compensation flows from service, like pensions of old, and the soldier is not consulted in the matter. Insurance is a contract, and the soldier takes it or leaves it alone; if he takes it, he pays for it, and his benefit is proportional to his payment. *White* v. *U. S.*, 270 U. S. 180, 46 S. Ct. 274, 70 L. Ed. 530. Compensation benefits are paid to veterans to compensate them for a loss of ability to follow their pre-war occupation. It is only payable when the incapacity is traceable to a service origin and in line of duty. Compensation is "rated" in percentages, from nothing to 200 per cent, and is figured on comparative inability to follow a pre-war occupation. When the disability occurs is immaterial, save that it must be traceable to service origin. The amount of benefits paid are the same to all equally disabled.

On the other hand, insurance benefits go only to those who have bought and paid for policies of insurance. The amount paid depends on the amount of insurance bought. There are no degrees of disability recognized by the insurance contract—no "ratings" made. An insured must be totally and permanently disabled, or he recovers nothing; 90 per cent disability avails him not. Nor does his disability depend upon his ability to follow his pre-war occupation; he must be disabled from following "any substan-

tially gainful occupation." Service origin is immaterial in insurance. If he is totally and permanently disabled while his insurance is in force, he recovers, regardless of its origin. A total disability directly traceable to service origin will not entitle him to recover, unless it occurred while his insurance was in force.

In the case of *Runkle* v. *United States*, 42 Fed. (2d) 804, the same Court said, at pages 806 and 807:

Disability under a war risk insurance policy is a different thing than disability under the compensation statutes. Disability under a war risk insurance policy is such "impairment of the mind or body as renders it impossible for the assured to follow continuously any substantially gainful occupation." War risk insurance deals with the individual case and with "any" occupation. Disability under the compensation statute, on the other hand, deals with "average impairments," and with inability to follow a pre-war occupation. Title 38, U. S. C. A., par. 477, defines disability ratings for the purposes of compensation as follows: "The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations similar to the occupation of the injured man at the time of enlistment and not upon the impairment in earning capacity in each individual case, so that

there shall be no reduction in the rate of compensation for individual success in overcoming the handicap of an injury."

That part of the report which estimates the disability of Runkle for compensation purposes is, therefore, immaterial, for it is not an estimate of *his* ability to pursue *any* gainful occupation, but is an estimate of the "average impairments of earning capacity resulting from such injuries in civil occupations similar to the occupation of the injured man at the time of enlistment."

Counsel for the appellant makes no claim that disability compensation and War Risk Term Insurance are the same, that the same laws govern each of these benefits, nor does appellant contend that disability for compensation purposes is the same as disability for insurance purposes. Obviously the record of an award of disability compensation, which was purely a rating which had been made of the appellant's ability to follow his pre-war occupation, is immaterial and irrelevant in a suit brought by him to recover the benefits provided by the terms of his contract in the event of his total and permanent disability from continuously following *any* substantially gainful occupation.

The same reasoning applies to the action of the Trial Court in refusing to admit in evidence the rating contained in the report of a Board of Medical Officers appearing in the summary of the Commissioner of the Supreme Court to the effect that the degree of the appellant's disability to perform

the duties of a soldier was one-half, which is the basis of appellant's assignment of error numbered 1. (R. 8.) Counsel for the appellant did not stipulate for the admission of this record which had been summarized, but reserved the right to object to the same. (R. 8.)

It is manifest that the standard by which the degree of disability of a person to perform the duties of a soldier is measured is far different from that applied to ascertain whether he is totally and permanently disabled from following *any* substantially gainful occupation.

Attention is invited to the fact that counsel for the appellant made no objection at the trial to the statement of the Court that the degree of disability referred to in the recommendation meant the disability to perform the duties of a soldier, and that the Court specifically stated that if counsel for the plaintiff desired he would state to the jury that they were not concerned with the degree of disability which the different medical officers at that time estimated, and that the important thing was that he was discharged because of disability to perform the duties of a soldier. (R. 10.)

There are no degrees of disability for War Risk Term Insurance purposes, as distinguished from the degree of disability sufficient to render one subject to discharge from the Army. Moreover, evidence of a degree of disability as to one's capacity to perform the duties of a soldier is entirely incompetent to be used in determining whether an

insured is totally and permanently disabled within the meaning of the provisions of his contract of War Risk Term Insurance, for the very apparent reason that proof of the former does not tend to prove the latter, inasmuch as there is no showing as to what standard is used in determining the degree of one's disability as a soldier.

To permit the introduction of evidence as to the degree of disability which the appellant might have suffered and which might have prevented him from performing the duties of a soldier would be in effect to permit the introduction of evidence as to the degree of disability which the appellant might have suffered and which might have prevented him from following his pre-war occupation. This is not the criterion. The test of total and permanent disability is not whether he can follow a particular occupation, but it is whether he can follow *any* substantially gainful occupation, and the admission of evidence concerning the degree of disability as to a particular occupation can only serve to confuse and becloud the issue.

It is therefore respectfully submitted that the Record of the award of Compensation to the appellant and the Record of the Degree of disability of the appellant from following the duty of a soldier were irrelevant, immaterial, and incompetent to the determination of the issue in this case, and that the action of the Court in excluding the same was just and proper.

(B) Appellant's assignments of error numbered 9 and 10 are based upon the allowance by the Court of two prayers requested by the appellant, by which the Court instructed the jury that the mental and physical ability to follow continuously a substantially gainful occupation, rather than a mere showing that the appellant did not work, is the test of his permanent and total disability, that if they believed from the evidence that the appellant was in fact able to work continuously for considerable periods of time after May 31, 1918, or failed or refused to work continuously during considerable periods of time since that date, when he could have worked, they should find a verdict for the appellee (R. 61 and 62); or if they believed from the evidence that any disability shown to have been suffered by him had been for any considerable length of time between May 31, 1918, and the present, less than total, they should return a verdict for the appellee. (R. 62.)

Counsel for the appellant in his brief has also referred to the refusal of the Court to grant two prayers requested by him. It is to be noted that the action of the Court in this regard was not included in the assignment of errors filed herein.

In the case of *Cooper* v. *Sillers,* 30 App. D. C. 567, 36 W. L. R. 251, this Court held that only errors which had been properly assigned would be considered. However, an examination of the general charge which was given to the jury by the

Court in the instant case clearly demonstrates that no possible error was committed in the granting of the appellee's prayers nor in the rejection of the appellant's.

In this connection the attention of the Court is invited to the case of *Railway Company* v. *Whitton's Administrator,* 13 Wallace 270, in which the Supreme Court of the United States, at page 290, said:

> But it is not error for a Court to refuse to give an extended series of instructions, even though some of them may be correct in the propositions of law which they present, if the law arising upon the evidence is given by the Court with such fullness as to guide correctly the jury in its findings, as was the case here; nor is a judgment to be set aside because the charge of the court may be open to some verbal criticisms, in particulars considered by themselves which could not when taken with the rest of the charge have misled a jury of ordinary intelligence.

In 38 Cyc. at page 1781, it is said:

> It is not essential that a single instruction should embody the entire law of the case, and an omission to state the entire law in one instruction is not error if the omission is reasonably supplied elsewhere, so that the charge as a whole fairly and fully presents the law applicable to the issues.

Among the cases cited by the appellant are some which dealt with the presumption as to service-con-

nected disabilities provided by the terms of Section 200 of the World War Veterans' Act, 1924, as amended July 2, 1926, par. 7, 44 Stat. 793 (38 U. S. C. A., par. 471). This presumption has no possible application to the facts in the instant case.

Furthermore, Congress, by an amendment to Section 200 of the World War Veterans' Act, 1924, enacted July 3, 1930, par. 11, 46 Stat. 995 (38 U. S. C. A., par. 471), which is not referred to in the appellant's brief, removed any doubt which had theretofore existed on this subject and made it perfectly clear that the presumption of service origin of disability, provided by the provisions of Section 200 of the World War Veterans' Act, is not applicable to claims based upon contracts of War Risk Term Insurance. *United States* v. *Searls,* 49 Fed. (2d) 224.

It is also to be noted in this connection that the case of *Hines* v. *Welch,* 57 App. D. C. 371, which is cited by the appellant, and which was decided by this Court, was a mandamus proceeding involving the right of the petitioner to collect certain disability compensation.

The case of *Burgoyne* v. *United States,* — App. D. C. —, 57 Fed (2d) 764, has also been cited by the appellant. In that case it was held that the failure of the Court to give certain instructions requested by the appellant was not cured by anything contained in the general charge, and that the language used by the Court in charging the jury was misleading and probably seriously affected the result.

Although the appellant contends that a similar error was committed in this case, it is apparent from an examination of the charge which was given in the instant case that no error was committed therein, but that, on the contrary, the charge is in entire harmony with the decision of this Court in the *Burgoyne case.*

Particular attention is invited to the fact that the Court instructed the jury that ability to perform some work did not indicate in and of itself that the appellant was not totally and permanently disabled (R. 62); that if they believed that the work performed by him was injurious to his health, and that it was not possible for him to continuously work without substantial injury to his health, the fact that he worked should be given such weight as they thought it entitled to in connection with the other testimony (R. 62); that the term permanent total disability does not mean that there must be absolute incapacity to do any work at all (R. 62); that intermittent, irregular employment and the receipt of reasonable compensation therefor is not in and of itself conclusive evidence of lack of total and permanent disability (R. 62); that a man may, by force of strong will or by his necessities, engage in work at times when his physical condition is such that he ought not to work (R. 63); that ability to continuously follow a substantially gainful occupation implies an ability to compete with men of sound mind and average attainments under the usual conditions of life; that what is meant is

clearly the ability to earn substantially through independent efforts (R. 64); and that if the appellant was able to follow gainful occupations only spasmodically, with frequent interruptions due to disability, he would be entitled to recover (R. 64).

It is respectfully submitted that the prayers which were given by the Court at the request of the appellee are correct, for if an insured can work and is not totally disabled for considerable periods of time he can not be heard to say that he was totally and permanently disabled at an earlier date, and these instructions when taken with the general charge of the Court assisted the jury in reaching a just and proper verdict. Moreover, it is apparent that the general charge of the Court embodied the principles enunciated in the cases cited by the appellant, and that the jury was instructed in a clear and complete manner as to the law applicable to the issues.

II

As to assignments of error numbered 7, 8, and 13

(A) Appellant's assignment of error numbered 7 is based upon the admission in evidence of the depositions of Dr. J. A. McIntosh, Dr. W. S. Hanson, and Dr. M. W. Deberry. These physicians had from time to time examined the appellant. The stipulation which was entered into by and between counsel for the appellant and appellee in no manner precluded the right of the appellee to call these physicians as witnesses, but merely provided that

the summary of the Commissioner of the Supreme Court concerning the official reports which had been made by them acting in behalf of the United States Veterans' Bureau might be offered in evidence with the same force and effect as if the originals of the reports were introduced. (R. 30, 38.) The portions of the summary of the Commissioner were received in evidence as official records of the United States Government, and it is submitted that it was entirely proper for the Court to permit these physicians to amplify the reports and records which had been made by them by testifying in person as to their opinions concerning the appellant's condition. Had the summary of their reports not been prepared by the Commissioner it would have been manifestly correct for these physicians to have identified their reports, and the same would then have been admissible in evidence together with their testimony upon the subject. Surely the appellee is not to be deprived of their testimony because the reports are summarized by the Commissioner, who was appointed by the Supreme Court of the District of Columbia in order to expedite the trial of War Risk Insurance cases in the District.

Attention is also invited to the fact that Section 1058 of the Code of Law for the District of Columbia, 1924 (D. C. Code, 1929, Tit. 9, Sec. 3), provides:

> If, at the time of trial, the witness can be produced to testify in open court the deposition shall not be read in evidence; but if the attendance of the witness can not be pro-

> duced then the said deposition shall be admissible in evidence, subject to such objections to the questions and answers as were noted at the time of taking the deposition, or within ten days after the return thereof, and would be valid were the witness personally present in court.

No motion was made to suppress the depositions of these physicians nor were any objections filed to the questions and answers contained therein within the time prescribed by the statute.

(B) Appellant's assignment of error numbered 8 is based upon the admission in evidence of a portion of the summary prepared by the Commissioner of the Supreme Court embracing an official record or report made by physicians of the United States Veterans' Bureau concerning an examination of the appellant at the Regional Office of the United States Veterans' Bureau at San Antonio, Texas, on May 5, 1925, and counsel for the appellant in his brief has cited several authorities which refer to the admissibility of hospital records and the circumstances under which they should be excluded or admitted in evidence. Particular attention is invited to the fact that counsel for the appellant in the instant case stipulated that the report, a summary of which was admitted in evidence, was a record of an examination of the appellant made by United States Government physicians or by private physicians employed by the United States Government, and that the said report or record was con-

tained in the files of the United States Veterans' Bureau. (R. 38.) The discussion in the appellant's brief concerning the admissibility or inadmissibility of hospital records in general, and whether or not such records are admissible under the hearsay rule, has no application in the instant case for the reason that the summary of the record was admitted as a public document. The record was made in regular course by government officials, whose duty it was to record the facts, and who had no motive to record anything except the truth. Certainly, in view of the stipulation, there can be no question as to the identification of the record which comes from the files of a department of the Government.

The reports of examinations made by physicians acting in behalf of the United States Veterans' Bureau, and which constitute a part of the official records of that department of the Government, are admissible in evidence. See *Cole* v. *United States,* 45 Fed. (2d) 339; *Runkle* v. *United States, supra; Worley* v. *United States,* 42 Fed. (2d) 197; and *Third National Bank* v. *United States,* 53 Fed. (2d) 599.

The attention of the Court is also respectfully invited to the opinion rendered by this Court in the case of *Burgoyne* v. *United States, supra,* in which it was said:

> We presume, however, that the objection to the admission of the reports grows out of their violation of the hearsay rule. If the

> reports, the tenor and purport of which we are able to gather only from some of the statements which appear in the colloquy between the court and counsel, were regular Government hospital records made by Government officials whose official duty it was to record the facts, we think the point against their admissibility would not be well taken. Wigmore on Evidence, vol. 2, secs. 1420, et seq. * * *

(C) Appellant's assignment of error numbered 13 is based upon the admission in evidence of the deposition of George A. Thompson. While it is true that the appellant denied at the trial that he had ever used any other name than his own or that he worked as Frank Debel or that he ever worked at Childress, Texas, nevertheless before the deposition of George A. Thompson was read in evidence a letter dated October 24, 1922, and which the appellant admitted he signed, was admitted in evidence, in which letter the appellant stated he had been working as a strike breaker for the Fort Worth and Denver Railroad Company at Childress, Texas. (R. 3 and 45.)

The deposition itself disclosed the fact that the person who was employed by the Fort Worth and Denver Railroad Company at Childress, Texas, under the name of Frank Debel, had stated in his application for employment as a machinist the day, month, and place of his birth, his residence, the name of his landlady, and that he had previously worked for the Ford Motor Company. (R. 49 and

50.) All of these statements which were made by the person who was employed under the name of Frank Debel coincided with the testimony which was adduced at the trial concerning the day, month, and place of the appellant's birth (R. 5 and 7), his residence, and the name of his landlady (R. 3). The testimony also showed that the appellant had worked for the Ford Motor Company as a machinist prior to enlisting in the United States Army. (R. 50.)

Attention is also invited to the fact that no motion was made to suppress this deposition, nor were any objections filed to the questions and answers contained therein within the time prescribed by Section 1058 of the Code of Law for the District of Columbia, 1924 (D. C. Code, 1929, Tit. 9, Sec. 3).

The question whether Frank Demeter and Frank Debel are the same person was one of fact to be decided by the jury, together with all other questions of fact in the case. With this thought in mind, and in order to allow the jury to pass upon this question without in any way prejudicing the appellant, the Court stated (R. 46):

> I think there is sufficient evidence now to permit this to go to the jury, and it will be for them to say whether or not this is the same man.

III

As to other assignments of error

(A) In so far as appellant's assignments numbered 2, 3, 4, 5, and 11 are concerned, the atten-

tion of the Court is respectfully invited to the fact that they are neither based upon nor justified by the record. On the contrary, for example, as to assignment numbered 5, it appears that the Court specifically stated that the appellant was entitled to place his certificate of discharge in evidence (R. 9), and that the discharge was as a whole offered and received in evidence (R. 7).

(B) As to appellant's assignment numbered 12, it is respectfully submitted that the instruction which is objected to, and by which the Court directed the jury that it was their duty to disregard any appeal made solely for exciting their sympathy, if any such appeals had been made, is based upon the soundest legal principles, and the very language of the instruction overcomes the objection which has been made by the appellant.

IV

CONCLUSION

For the reasons above set forth, it is respectfully submitted that no error was committed by the Court in this case, and that the judgment which was entered should be affirmed.

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